In the Supreme Court of the United States

October Term, 1979
No. 79-346

WALTER F. KERRIGAN,

Petitioner,

v.

FAIR EMPLOYMENT PRACTICE COMMISSION OF THE STATE OF CALIFORNIA and CITY OF SAN DIEGO, CITY ATTORNEY'S OFFICE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PROVISIONS OF LAW INVOLVED

The provisions of state law involved are set forth in Appendix A in the order in which they appear in the text.

QUESTIONS PRESENTED

Does this court have jurisdiction to review the judgment of the state court where no federal right was claimed in any of the state proceedings and where no federal question has been decided by the state court?

STATEMENT OF THE CASE

On or about September 20, 1973, petitioner, Walter F. Kerrigan ("Kerrigan"), an attorney representing himself in this petition, filed an administrative complaint with the Fair Employment Practice Commission ("Commission") of the State of California which alleged that he had been denied employment by the City Attorney's Office of the City of San Diego on the basis of his age in violation of former California Labor Code section 1420.1(a) [1] Kerrigan did not claim the infringement of any federal right and no federal question was raised in the administrative complaint.

Thereafter an accusation was issued by the state agency and the matter came on for hearing before the Commission with an Administrative Law Judge presiding. No federal question was raised at the administrative hearing. The Commission adopted the decision of the Administrative Law Judge who found that the City of San Diego, City Attorney's Office had not refused to hire or employ Walter F. Kerrigan solely because of his age, and had not violated California Labor Code section 1420.1(a). No federal question was presented to or decided by the Administrative Law Judge or the Commission.

Subsequently Kerrigan filed a petition for writ of mandate with the Superior Court of California for the County of San Diego pursuant to California Code of Civil Procedure section 1094.5 claiming that the Commission's decision was invalid under section 1094.5 because that decision was not supported by the evidence adduced at the administrative hearing. Kerrigan did not claim the infringement of any federal right. The Superior Court found that the Commission's decision was supported by substantial evidence and in addition, applying the independent judgment test, the court found that from a preponderance of the evidence presented by the record that the City of San Diego's City Attorney's Office did not refuse to hire Kerrigan solely because of his age and did not violate California Labor Code section 1420.1(a). No federal question was decided by the Superior Court.

[1] Section 1420.1(a) has been revised. The operative section at the time this case was heard may be found in Cal. Stats. 1972, ch. 1144, p. 2211 § 1 and is set forth in Appen. A hereto.

Kerrigan appealed the Superior Court's decision to the Court of Appeal of the State of California, Fourth Appellate District, Division One. No federal right was asserted by Kerrigan in the Court of Appeal. The appellate court affirmed the trial court's judgment, concluding that the independent judgment test was the appropriate standard to be applied by the trial court and that there was substantial evidence to support that trial court's independent judgment. (Pet. Appen. B-11, B-12.) No federal question was decided by the Court of Appeal.

Kerrigan's petition for rehearing in the Court of Appeal and his petition for hearing to the California Supreme Court were denied. No federal right was asserted in either of the petitions to the state courts.

ARGUMENT

I.

THIS COURT HAS NO JURISDICTION TO HEAR KERRIGAN'S PETITION

A. No Federal Claim Was Presented to the State Courts and No Federal Question was Decided by the State Courts.

Kerrigan purports to invoke jurisdiction of this Court under Title 28, United States Code, section 1257(3) and claims that "such rights have been especially set up and

claimed under the Constitution of the United States." (Pet. p. 2.)

Section 1257(3) provides in pertinent parts:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . .
>
> "(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

As pointed out in the statement of the case, *supra,* no federal right was claimed in any of the state proceedings and no state court decided any federal question.

Moreover, Kerrigan has not attempted to comply with Rule 23(f) of this Court's rules which provides:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (*e.g.,* by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.,* ruling on exception, portion of the courts' charge and thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.
>
> "Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented." (28 U.S.C.A. § 23(f).)

Kerrigan has failed to point to any instance in the proceedings below where the federal questions sought to be reviewed were raised.

The threshold question for Supreme Court review of state court decisions is that the tendered federal questions have been presented to the state courts. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 438 [89 S.Ct. 1161, 1163]; *Hill v. California* (1971) 401 U.S. 797, 805-806 [91 S.Ct. 1106, 1111].)

Because the requirement that the federal question be properly presented to the state court is jurisdictional, the party seeking review must carry the burden of proving that the federal questions were presented to the state courts. (*Street v. New York* (1969) 394 U.S. 576, 582 [89 S.Ct. 1354, 1360]; *Fuller v. Oregon* (1974) 417 U.S. 40, fn. 11 [94 S.Ct. 2116 fn. 11].)

Kerrigan has totally failed to prove that any federal questions were presented to the state court to which Kerrigan's petition is directed.

Futhermore no federal question was in fact considered or discussed by the state courts. (See Pet. Appen. B.) The entire case was presented to the state courts and decided by the state courts in terms of state law under the California Fair Employment Practice Act (Cal. Lab.

Code § 1410 *et seq.*), and cannot be shifted tardily into a constitutional argument. (*Bailey v. Anderson* (1945) 326 U.S. 203, 205-207 [66 S.Ct. 66, 68].)

B. No Federal Question Is Presented by the Petition.

Kerrigan's underlying argument seems to be that an unproved violation of California's Fair Employment Practice Act should be translated into a violation of the First and Fourteenth Amendments, and of the privileges and immunities clause of Article IV of the United States Constitution. On this basis he would have this Court decide federal questions which were never raised in the state court proceedings. Moreover, while the petition posits three rhetorical federal questions, it fails to bring the facts of this case within the parameters of those questions.

The first purported question is whether a city's alleged violation of the California Fair Employment Practice Act is a violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution. Accepting as given, that under California law the burden of proof of a violation of the Act is squarely on the person claiming that a violation occurred (Cal. Lab. Code § 1420.1(b)), petitioner's argument only addresses the question of the purported existence of a prima facie case of discrimination, not whether the ultimate burden of proof was met. Introduced into evidence at the administrative hearing was a job notice advertisement from the City Attorney's office which listed certain personnel statistics including age. Kerrigan concludes that this advertisement violates 29 United States Code § 623(e) but cites no authority which suggests that it would amount to a violation of the Constitution.

As an alternative means of establishing his prima facie case, Kerrigan asserts that he met the requirements of the

federal standard for certain Title VII cases, established in *McDonnell-Douglas v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817] and upheld in *Furnco Construction Corp. v. Waters* (1978) 438 U.S. Adv. Sh. 567 [98 S.Ct. 2943]. Both of these cases dealt *solely* and *specifically* with alleged racial discrimination in hiring in violation of Title VII of the Civil Rights Act of 1964; not as petitioner contends, with age discrimination, and not with violations of the Constitution. Assuming arguendo that an analogous standard were applicable to a case of alleged age discrimination and that petitioner had met the threshold test and established a prima facie case, the burden would then shift to the employer to show a legitimate non-discriminatory reason for the rejection. In this instance the city was able to offer four presumptively legitimate reasons, in the opinion of the administrative agency and the lower courts, for rejecting petitioner. This shifts the burden back to the petitioner to show by "competent evidence" (*McDonnell-Douglas, supra,* 411 U.S. at 805) that the employer's "stated reason for [his] rejection was in fact pretext." (*Id.* at 804.) The state court found that the petitioner's evidence was insufficient to rebut the apparently valid rejection.

Petitioner did not establish the existence of a state law violation and the proffered federal question was not raised. Even if it were assumed, against the state courts' judgment, that petitioner could make a sufficient showing to carry his burden of proof, the petition does not address the constitutional question petitioner claims such a violation would raise. Namely, would this state law violation also violate the Fourteenth Amendment? The first question presented in the brief remains unaddressed.

The second question purportedly presented by the petition is whether a city has an absolute right to deny equal employment opportunity to a new California resi-

dent without violating the privileges and immunities clause of the Constitution. Petitioner now insists that respondent did not hire him because he had come to California to retire. (This was neither alleged, admitted, nor proved in the state proceedings.) He concludes that a refusal on this basis would be a violation of the privileges and immunities clause citing *Hicklin v. Orbeck* (1978) 437 U.S. Adv. Sh. 518 [98 S.Ct. 2482]. *Hicklin* struck down an Alaska state law requiring private employers to hire Alaska residents in absolute preference over non-residents. This case is certainly not on point, since petitioner makes no claim of the existence of a comparable state or local statute.

Petitioner's final question asks if a city may retaliate against him for filing a complaint with the State Fair Employment Practice Commission in violation of the First and Fourteenth Amendment guarantees. Since the state courts found that Kerrigan did not charge such an offense below (Pet. Appen. B-12), he cannot raise it in this court in the first instance.

Petitioner insists however, that this court should assume jurisdiction over a factual allegation not charged or proved below because of a statement made at the adminstrative hearing. He cites no competent authority for such a proposition but instead misquotes and misconstrues the holding in *Pettway v. American Iron Pipe Co.* 411 F.2d 998, 1005 (a general guarantee of freedom from reprisal for an employee who files Title VII charges with the United States Equal Opportunity Commission) and concludes that even if the original claim of discrimination wasn't proved that reprisal claim should have been reached. Petitioner attempts to bolster this conclusion by citing several state and federal cases which hold that technical procedural flaws in a lay person's complaint or pleadings should not bar a decision on the merits, so long

as the discrimination issue was actually raised. This adds nothing to petitioner's argument. Petitioner is not a layperson but an attorney and the retaliatory issue was not properly raised under state law. Petitioner is simply attempting to appeal a state court decision based on state law which he finds disagreeable. He does not even discuss the constitutional issues supposedly raised by the purportedly "retaliatory act."

The statement of federal questions presented is empty form. In substance, Kerrigan is appealing a state court decision based on state law. Each question presupposes the existence of a state law violation and asks whether it also violates constitutional guarantees. However, in each case the question petitioner answers is not the one he asked. He merely argues the factual issues already fully litigated in the state proceedings. This method does not begin to address the federal questions asked at the outset and demonstrates no basis for Supreme Court jurisdiction.

CONCLUSION

Kerrigan has completely failed to show that any federal question was raised in the state courts and no federal question is presented by the petition. Therefore the petition for writ of certiorari must be denied.

Respectfully submitted,

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APPENDIX.

PROVISIONS OF STATE LAW INVOLVED

Former California Labor Code Section 1420.1(a) (Cal. Stats. 1972, ch. 1144, p. 2211 § 1)

Section 1. Section 1420.1 is added to the Labor Code, to read:

1420.1. (a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual between the ages of 40 and 64 solely on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or employee failed to meet bona fide requirements for the job or position sought or held, or to affect bona fide retirement or pension programs; nor shall this section preclude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.

Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under the established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.

(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred.

(c) The age limitations of the apprenticeship programs in which the state participates shall not be deemed to violate this section.

APPENDIX A

California Code of Civil Procedure Section 1094.5(a), (b) and (c)

§ 1094.5. Review of administrative orders or decisions; filing record; extent of inquiry; abuse of discretion; relevant evidence; judgment; stay

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.